CLERK'S COPY.

72

1272
S. C.

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904.~~ 1905.

No. ~~[illegible]~~ 58.

ALABAMA GREAT SOUTHERN RAILWAY COMPANY

vs.

H. C. THOMPSON, ADMINISTRATOR OF FLORENCE JAMES, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JULY 7, 1904.

(19,411.)

Consideration of the cases on this subject should begin with attention to the case of *C. & O. Railway Co.* v. *Dixon,* 179 U. S., p. 131. It was an action against the railway company, and the engineer and fireman operating the engine, for causing the death of the decedent at a highway crossing of the track.

Nothing decided in that case militates against our present contention, for the following reasons:

(1) This court held in that case that the allegations of the petition were consistent with concurrent negligence on the part of the railway company. (Last par., p. 139.) In the present case the questions propounded show there was no concurrent negligence of the master.

(2) Where the liability of the master is solely because of that relation, and the liability of the servant is because of his personal act in doing the wrong, the question whether a joint cause of action accrues, was not passed upon by this court. Mr. Chief Justice Fuller, after stating that some courts had decided that such liability of master and servant might be enforced in the same action, and that other courts had decided to the contrary, said:

"The determination of which (*i. e.*, the right to enforce such liability in the same action) by the highest court of Kentucky we are not called upon to revise, as the disposition of this case turns on *other considerations.*" (p. 137. Italics ours.)

(3) The action in that case was founded on a statute of Kentucky which authorizes the suit under it to be brought against "the corporation or corporations, their

agents or servants causing the same." (Ky. Stats., Carroll, 1899, Sec. 6.)

The Court of Appeals of Kentucky holds that this statute creates a joint cause of action, as we understand the decision of that tribunal. *Winston's Admr.* v. *I. C. Ry. Co.*, 23 Ky. Law Rep., at p. 1285.

But the Tennessee statute does not create the cause of action. It merely continues decedent's cause of action by abrogating the common law rule abating personal actions on the death of the injured person. *Elliott* v. *Felton* (U. S. Circuit Court of Appeals, Sixth Circuit), 119 Fed. Rep., 270.

Mr. Chief Justice Fuller, in the opinion in the Dixon case, supposed Mr. Justice Gray, then Chief Justice of Massachusetts, had remarked in *Mulchey* v. *Methodist, Religious Society,* 125 Mass., 487, that the question is "a somewhat nice one" whether, in a case like the one now under discussion, the master and servant can be joined in the same action.

It is important to note that the remark was not made by Chief Justice Gray. On the contrary, in *Mulchey* v. *Methodist Religious Society,* he said in unqualified terms that such an action could *not* be maintained. The language attributed to him was used by the writer of the opinion of the Supreme Court of Maine in *Campbell* v. *Portland Sugar Co.,* 62 Me., 552. What was there said on the subject is:

"But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but there are substantial reasons

assigned in *Parsons* v. *Winchell,* 5 Cush., 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury."

Taft, J., in writing the opinion of the Court of Appeals, in *Warax* v. *The C., N. O. & T. P. Ry. Co.,* 72 Fed. R., p. 637, gave thorough consideration to the subject. He states most ably the present state of the law. He says (p. 642) that the rule which permitted a plaintiff to join several defendants in one action of tort was based originally on the theory that they were to be held as conspirators; "and that each, having knowingly embarked on the unlawful adventure, was liable for all that the other did, and that therefore they could be held as partners in wrong," and that finally joint trespassers, who were guilty of negligence operating to produce injury, were regarded as acting in concert, each to be held as liable for the entire damage, "as for a joint tort."

He then adds:

"Hence, the question is whether, when a master is held liable for the negligence of his servant in his absence, which negligence he did not direct, he can be said to have acted in concert with the servant to produce the injury in such a way as that he and the servant can be held liable in the joint action. Clearly not. His liability does not arise from any common purpose that he had with the servant, or from any actual unity of action between them, in point of time and effect, or otherwise. His liability arises simply and solely from the policy of the law, which makes him responsible for the acts of his servant, done in the discharge of his business. The rule by which he is held is usually referred to as the rule of *respondeat superior.*"

After quoting a passage from Mr. Pollock, the learned judge proceeds (p. 643):

"It will thus be seen that the master is not held on any theory that he personally interferes to cause the injury. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs, done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject. The liability of the servant, on the other hand, arises wholly because of his personal act in doing the wrong. It does not grow out of the relation of master and servant, and does not exist at all, unless it would also exist for the same act when committed, not as the servant, but as the principal. *Liabilities created on two such wholly different grounds can not and ought not to be joint.*" (Italics ours.)

To show that the liability of the master for the unauthorized act of the servant is a separate liability from that of the servant, it is useful to consider that when forms of actions were in vogue the master could be made liable in such case only by action *on the case;* while the servant, as an immediate offender, was liable in trespass. This is well illustrated by the case of *Sharrod* v. *The London & Northwestern R. R. Co.,* 4 Ex. Rep., * p. 580. The action was trespass for driving a railway engine over the plaintiff's sheep, by means whereof they were killed. It appeared that the sheep had got upon the defendant's line of railway in consequence of defective fences, and were run over by an express train drawn by a locomotive engine, driven by a servant of the company, who had directions to drive at a certain rate per hour; and it was suggested that, while going at that rate, in the dusk of the

evening when the accident happened, the driver could not have seen the sheep in sufficient time to avoid the collision. The sole question was whether the company was liable in trespass. After elaborate argument it was held that the proper form of action was trespass on the case, and not trespass. The reason of the decision is founded upon the essential difference between the liability of the servant and that of the master. In the course of argument at the bar, Alderson, B., said (p. 583):

"If a master directs a servant to do a particular act, which, by the mere force of nature, can not be done without producing injury to another, and the servant does the act, the master is liable in trespass, because he directs his servant to do an act which must necessarily result in an injury."

This was said in reply to the claim of counsel that under the requirement to drive the engine at a certain rate per hour, the driver could not in the dusk of evening have seen the sheep in time to avoid collision, and that thus the company was directly instrumental in such injury.

And in further reply to this view, Parke, B., in delivering the judgment of the court, said (* p. 587):

"We should observe, that, though the master in this case is taken to have ordered the driver of the engine to proceed at a great speed, it did not follow as a *necessary* consequence that it would impinge on the plaintiff's cattle. It might not have happened, if the driver had seen the cattle sooner, or the cattle had heard the engine, and got out of the way. The act, therefore, can not be treated as a trespass, on the ground that it was, by necessary implication, ordered to be done by the defendants—the

principle on which the case of *Gregory* v. *Piper* was decided. This is the simple case of an act done by the servant in the course of his employment, not specifically ordered by the master; and though the injury by such an act be *direct* so far as relates to the servant, we have recently held that a master would not be responsible in trespass."

It is obvious that the abolition of forms of action by codes of procedure, if there be such code in Tennessee, would not affect the value of the case last cited, in its application to the present question.

In Pomeroy on Code Remedies, 4th Ed., Sec. 208, it is said:

"The common law doctrines concerning the liability of tortfeasors, and as to joinder or separation of them in actions brought to recover damages for the wrong, are entirely unchanged by the new system of procedure. It is unnecessary to repeat these ancient rules; that they are still in operation, with their full force and effect is sufficiently shown by the following particular instances;"

And after stating the instances he proceeds (Sec. 209):

"In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action should be possible, there must be some community in the wrong-doing among the parties who are to be united as co-defendants; the injury must in some sense be their joint work. It is not enough that the injured party has on certain grounds a cause of action against one, for the physical tort done to himself or his property, and has, on entirely different grounds, a cause of action against another, for the same physical tort. There must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action. This principle is of universal application."

In Bliss on Code Pleading, 3d Ed., Sec. 83, it is said:

"Persons are not jointly liable for a tort merely because they have some connection with it, even if it may give a several cause of action against them. There must be some co-operation in fact; 'there must be some community in the wrong-doing among the parties who are united as co-defendants.'"

See also 17 Am. & Eng. Encyl. of Law (1st Ed.), p. 602.

The decided weight of authority is in favor of the proposition that a joint action will not lie against the master and servant for an injury caused solely by the want of care of the servant in the course of his employment.

The principal case in this country is *Parsons* v. *Winchell*, 5 Cush., 592. It was an action against three defendants, one of whom was the servant of the other two, for an injury caused by careless driving on the part of the servant. It was held that there was no joint liability. The court said (p. 593):

"To maintain an action against two or more jointly, the plaintiff must show a joint cause of action. In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact, or in legal intendment and effect. In trespass, all are principals, and he who commands a trespass to be committed, though absent when it is committed, is regarded as a trespasser, and may be sued alone, or jointly with him who obeyed his command. * * * But the act of a servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subsequently adopts it. In other cases, he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor."

The opinion contains a careful review of the authorities.

This case was followed and this doctrine re-affirmed in *Mulchey* v. *Methodist Religious Society,* 125 Mass., 487, where the opinion was delivered by Chief Justice Gray. It was an action in tort against the society, and Barber and Sleeper, a committee authorized to have its church edifice painted; and for that purpose to employ a carpenter and builder to erect and remove the staging and to supply the materials and labor. They employed one Curtis to erect and remove the staging, and also employed the plaintiff to paint the ceiling of the church. While so engaged he was injured by the fall of the staging. On the trial the court was asked to charge the jury that the party injured by the act or negligence of the agents, there being no evidence of any action of the principal other than the acts of the agents, might elect to sue either, but could not maintain an action against both jointly (p. 488).

The court refused to give this instruction, and a verdict was returned against all the defendants, and for error in refusing to give the instruction the judgment was reversed. Mr. Justice Gray said (p. 489):

"But the jury should have been instructed, as requested by the defendants, that this action, being in the nature of an action on the case, could not be sustained against both the society and its agents. If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, *not as if the negligence had been its own,* but because the law made it answerable for the acts of its agents. Such negligence would be neither in

Supreme Court of the United States

OCTOBER TERM, 1904.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY

No. 311. *vs.*

H. G. THOMPSON, Administrator of Florence James, Deceased.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief for Alabama Great Southern Railroad Company in Support of the Right of Removal.

STATEMENT OF CASE.

This case comes into this court on a certificate of the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, asking instruction of this court for the proper decision of two questions arising upon the record of the case. These questions are:

1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?

2. Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds $2,000, exclusive of interest and costs, and the requisite diversity of citizenship exists between said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint tortfeasors being identical with that of plaintiff?

The certificate shows that the action was an action in tort brought in a state court of Tennessee by a citizen of that state against the Alabama Great Southern Railroad Company, a corporation under the laws of Alabama, and William H. Mills and Edgar Fuller. The individual defendants were citizens of the same state as plaintiff. They were respectively the engineer and conductor of a train of cars of the railroad company operated on its railroad. The cause of action set forth in the declaration is succinctly represented in the certificate as follows:

"That the intestate of the plaintiff had been negligently and carelessly run over while upon the track of the railroad company, in the exercise of due care, by an engine and train of cars owned and operated by the railroad company, which said train was at the time under the management and control of the individual defendants William H. Mills as conductor and Edgar Fuller as engineer."

The case was removed into the United States Circuit Court upon petition of the railroad company alone, upon the ground that the controversy was one "wholly between citizens of different states," viz.: the railroad company and the plaintiff, "and could be fully determined as between them;" and involved more than two thousand dollars, exclusive of interest and costs. (1 Sup. Rev. Stats. U. S., 2d Ed., Sec. 2, p. 612.)

A motion to remand the case to the state court was made by the plaintiff on the ground that "no removable separable controversy appeared." This motion was overruled. A trial in the United States Circuit Court resulted in a judgment for the plaintiff, and the railroad company sued out a writ of error and brought the case into the Court of Appeals. In that court the judges, entertaining grave doubt as to whether "*a joint right of action* was stated against the railroad company and the two individual defendants who were servants of the railroad company," certified a statement of foregoing facts to this court and ask its instructions on the questions already stated.

ARGUMENT.

I.

The removal of the case was made under the act of Congress passed August 13, 1888, to correct the enrollment of the act of March 3, 1887, and is found in 1 Sup. Rev. Stats. of United States (2d Ed.), p. 611. A part of Section 2 of said act is as follows:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

Of course, the ultimate question is the right to remove this case to the United States Court. The questions submitted by the judges make this right depend upon whether there is a joint cause of action against the company and its servants, where the cause of action stated is negligence of the servants in the operation of a train of cars, without any act or omission, express or implied, of the company itself.

Parties can not be guilty of a joint tort unless each has contributed to the harmful result. In the present case the company, itself, has not been an actor in that which caused the injury. Its sole responsibility is because in law it is surety for the conduct of these servants. On that account alone it is sued. Does such responsibility make it proper to join them with the company in an action? The liability of the individual defendants is because they did the thing that brought about the injury. Such liability is entirely separate from that of the company. The questions propounded state the case of a principal neither present at, nor directing nor concuring in, the act which produces the injury. The railroad company in the case certified does no act; it only suffers vicariously for the acts or omissions of others for whose conduct by social

exigency or by the rescript *respondeat superior*, it is made sponsor. It is not, however, a term of this sponsorship that the principal may, in such a case, be sued in the same action with the immediate offender. This liability of the master is enforceable only in trespass on the case, while the servant is liable in trespass *vi et armis*. Mr. Justice Holmes says the liability of the master for the acts of servants, which acts he has not authorized but has forbidden, "has been supposed in England to have been manufactured out of the whole cloth." But he traces its beginnings to the Anglo-Saxon institution of *Frithborh* or frank-pledge, whereby the master "was made the pledge of his servants to hand them over to justice or to pay the fine himself." (4 Harvard L. Rev., 355; also the Common Law, pp. 9, 15, 20.)

Mr. Pollock, in his work on Torts (6th Ed., p. 75), says that "no reason for the rule, at any rate, no satisfactory reason, is commonly given in our books." He then shows (p. 76) that the maxim "*qui facit per alium facit per se*" does not account for the rule, because that maxim is in terms applicable only to authorized acts, not to those acts that, although done by the agent or servant in the course of service, are specifically unauthorized or even forbidden. He then says that the maxim "*respondeat superior*" is a dogmatic statement, and not an explanation. But we venture to assert that it does explain; and that the explanation is that the rule is of dogmatic origin. It admits of none other.

stated in *Bennett* v. *Fifield*, 13 R. I., 139, parties can not be declared against jointly where there is no community of wrong-doing, even though the tort of one might be such that, without it, the neglect of duty charged upon the other would not have followed.

"A similar statement is made in *Sellick* v. *Hall*, 47 Conn., 260, 274, that it is not enough to make torts joint that the acts constituting them stand in juxtaposition in time and place. 'There must be a oneness of act.' The fact that the effects of several wrongful acts are produced at the same time and place can not affect the question."

And, in holding that the action was not joint, the court said (p. 34):

"A joint liability is not made out by patching together individual liabilities which may arise from different relations to the same transaction."

The case of *Campbell* v. *Portland Sugar Co.*, 62 Me., 552, is one that has been widely cited and approved by courts. It is a case where a corporation, being the owner of a wharf, was sued jointly with its agents, who had control of the wharf, for injuries sustained by a third person through negligence in failing to keep the wharf in repair. The court held that the action could not be a joint action against the owner and the agent. After reciting the facts the court said:

"The corporation is answerable for its constructive negligence, or perhaps (to speak more exactly), on the principle of *respondeat superior*, and must be held, as Lord Kenyon remarked in 1 East, 108, 'to make compensation for damages consequential from the employing of an unskillful or negligent servant.'

"The other defendants, who were general agents of the corporation, and had the care of this wharf, and who

through their senior partner had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal.

"It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation, and when their acts or neglects result in injury to third parties, they are equally responsible with their principal. But it does not hence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, and we think there are substantial reasons assigned in *Parsons* v. *Winchell*, 5 Cush., 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury."

In *Trowbridge* v. *Forepaugh*, 14 Minn., 133, the action was joint against the City of St. Paul and certain individual defendants for personal injuries sustained by the plaintiff who fell into a hole in or adjoining the street. The allegations of the plaintiff were that the city was under the duty of keeping its streets and sidewalks in repair and free from obstruction; that one of the defendants was the owner of a lot fronting on the street, and that he and the other individual defendants excavated a hole in the street across the front of the lot and left the hole open and unguarded; and that the city also left the hole unguarded, by reason whereof plaintiff was injured. It was held that the defendants could not be jointly sued. The court said (p. 137):

"The liability of the city depends upon a state of facts not affecting its co-defendants; and the converse. Neither is in fact or in law chargeable with, or liable

on account of the matter set up as a cause of action against the other. They did not jointly conduce to the injury by any acts of omission or commission. Under such circumstances we find no case holding that a joint action is maintainable; we are of the opinion that it is unauthorized by any statute or legal principle."

In *Brinkerhoff* v. *Brown,* 6 Johns. Ch. Cas., p. 154, Chancellor Kent, in holding that a number of defendants were properly joined as defendants to the bill, used this language:

"The defendants performed different parts in the same drama; but it was still one piece—one entire performance, marked by different scenes; and the question now occurs whether the several matters charged are so distinct and unconnected, as to render the joining of them in one bill a ground of demurrer."

In the "drama" which formed the basis of the present action, the railroad company took no part at all, and therefore should certainly not be sued jointly with those who were the actors in the "piece."

There are many cases decided by various Circuit Courts and Courts of Appeals of the United States, in which the question now under consideration has been elaborately and ably discussed, and in which it has been held that in cases like the present the action is not joint and that master and servant can not be sued jointly. These cases are:

Warax v. *Cincinnati, N. O. & T. P. Ry. et al,* 72 Fed. Rep., 637, U. S. Court of Appeals, Sixth Circuit; opinion by Taft, J.

Beuttel v. *Chicago, M. & St. P. Ry. Co.*, 26 Fed. Rep., 50, Circuit Court, Nor. Dis. of Iowa, Shiras, J.

Fergason v. *Chicago, M. & St. P. Ry. Co.*, 63 Fed. Rep., 177, Cir. Court, Nor. Dis. of Iowa, Shiras, J.

Hartshorn v. *Atchison, Top. & S. F. R. R.*, 77 Fed. Rep., 9, Circuit Court, Wes. D. Mo., Philips, J.

Doremus v. *Root et al*, 94 Fed. Rep., 760, Hanford, J.

Helms v. *Northern Pac. Ry. Co.*, 120 Fed. Rep., 389, Circuit Court, Dis. Minn., Amidon, J.

Davenport v. *Southern Ry.*, 124 Fed. Rep., 983; Simonton, J.

Gustafson v. *Chicago, R. I. & P. Ry. Co.*, 128 Fed. Rep., at pp. 87, 88; Philips, J.

Shaffer v. *Union Brick Co., id.*, at p. 99 *et seq.*; Pollock, J.

McIntyre v. *Southern Ry. Co.*, 131 Fed. Rep., 985; Brawley, J.

Of these cases, *Warax* v. *C., N. O. & T. P. Ry.*, *Beuttel* v. *Chicago, etc.*, *Hartshorn* v. *Railway*, *Helms* v. *Northern Pac. Ry.* and *Shaffer* v. *Union Brick Co.* are especially noteworthy by reason of thoroughness of consideration given the subject, and the able review of authorities on both sides of the question.

The decisions we have cited of the courts of England and of the courts of last resort in Massachusetts, Rhode Island, Maine, New Hampshire, Connecticut, Ohio and Minnesota and of the U. S. Court of Appeals and of Circuit Courts of the United States clearly justify us in claiming that our argument is correct, and that Question No. 1 should be answered in the negative and Question No. 2 in the affirmative.

II.

Non-Liability of the Two Individual Defendants.

The argument thus far has proceeded upon the supposition of a liability on the part of the two individual defendants. But in the case represented by the questions certified we claim no liability is shown on the part of the conductor and engineer of the train; that it is entirely consistent with Question No. 1 that the injury, the subject of the action, was unintentional; that it was caused by the mere omission of the servants to observe some precaution required by due care; that it was not caused by an act of the servants done on their own responsibility. Where the injury is caused by mere neglect or omission of the servant the master alone is liable. By the rule *respondeat superior* the act of the servant in cases of mere negligence is absorbed in the master's liability. The servant is regarded in such cases as a mere piece of machinery in his hands. In such cases, as between servant and third person, the servant really ceases to be a juridical person so long as he confines himself to the limits of his employment, and does no intentional injury. In cases of negligence by omission, the servant is suable only through the principal, and the principal may have recourse against him on the contract of employment. So entirely is the agent regarded by law as a mere instrument, that a married woman whose very being is merged in her husband, may yet be an agent for another; although she could make no contract on her own account.

Our views are sustained by the following authorities:

Lane v. *Cotton*, 12 Mod., 472, was an action on the case against Sir Robert Cotton, Postmaster General, founded on the claim that the plaintiff, being possessed of eight exchequer bills in London, inclosed them in a letter directed to a goldsmith at Worcester and delivered the letter with the bills inclosed to one Breese, an officer under the defendant, duly elected to take in, and to deliver out, letters at the post-office in London, and that the letter was taken out of the office by an unknown person and the bills lost. It was held that the Postmaster General was not liable; and when it was suggested, in reply to the claim of hardship to which this would subject the plaintiff, that Breese might be held liable, Lord Holt said, at p. 488:

"It was objected at the bar, that they have this remedy against Breese. I agree, if they could prove that he took out the bills, they might sue him for it; so they might anybody else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or principal; for a servant or deputy, *quatenus* such, can not be charged for neglect but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrongdoer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrongdoer, or rescuer; and it will lie against any other that will rescue in like manner; and for this diversity, *vide* I. Leon., 146; 3 Cro., 175, 143; 41 Ed.,

3, 12; I. Ro., 78, which is not well reported, but the inference may be well made from it."

It would seem from the citations made by Lord Holt that he is stating what has been the law from a very remote period.

Dr. Wharton in his work on Agency and Agents, in Section 536, discusses this subject with great ability. At p. 350 he says:

"If the servant's negligence is only one of those instinctive aberrations common to the labor of one man when absolutely under another's control, then the master is the sole person responsible for such aberrations, and the servant is irresponsible civilly, unless to the master himself. Not inconsistent with this view is the argument often cited from Lord Holt."

He then refers to the passage above quoted from Lord Holt and proceeds:

"For negligences, Lord Holt tells us, the servant is not liable; for misfeasances he is liable. If we are to understand by negligences, in Lord Holt's sense, those imperfections in the discharge of duty which are incident to the labor of all men when under the control of others, and if we are to regard as misfeasances those torts which are committed by the servant out of the line of his employment, when acting on his own responsibility, then we can reconcile the famous passage just quoted not only with the principles here advocated, but with the analogies of the law in other relations."

And further on, at p. 351, this eminent commentator says:

"In the sense with which we are now concerned we have to view labor, when stripped of all discretion or liberty as to mode of action, as a machine, throwing upon

its employer the same responsibility as a machine throws upon him who runs it, and relieving the employee from liability to anybody but his master for injuries to third persons arising from the employee's negligence. It is but proper that if I should undertake to control the action of another in a particular line, I should stand between him and third persons, so far as he confines himself to such line, and inflicts no malicious injuries. I have extinguished his relations to others, so far as concerns this line, and others, therefore, as long as he keeps within the line, can not reach him except through myself."

Cameron v. *Reynolds*, 1 Cowp., 403, was an action against an under-sheriff for damages for failure to execute a bill of sale for goods he had levied on under a *fi. fa.*, and it was held that the action would not lie against him but only against the sheriff. Lord Mansfield, in delivering the opinion of the court, said, p. 406:

"The first objection is an objection upon the face of the declaration, that this action does not lie against the under-sheriff, and therefore that judgment ought to be arrested. As to that, we are all of opinion, the action does not lie against the under-sheriff. It is an action brought against him for a breach of duty in the office of sheriff. Wherever that is the case, the action must be brought against the high sheriff, as for an act done by him; and if it proceeds from the default of the under-sheriff or bailiff, that is a matter to be settled between them and the high sheriff."

Williams v. *Cranston*, 2 Starkie, *82, was an action on the case brought against defendant as a carrier, charging him with negligence in the carriage of a watch delivered to him to be carried from London to Weybridge, in consequence of which the watch was lost. It appeared,

fact, nor in legal intendment, the joint act of the principal and of the agents; and, therefore, both could not be jointly sued. It is not like the case of a willful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers and therefore liable jointly."

In this connection the case of *Hewett* v. *Swift and others,* 3 Allen, 420, should be noticed. It was an action in trespass *vi et armis,* by reason of an assault and battery committed by the servant of the company, who had charge of the freight in the freight depot, upon a boy who was playing there and who refused to leave when requested by the servant to do so. The boy was forcibly removed by the servant, who, in doing so, kicked him and severely injured him. Swift, the president of the company, had given this servant instructions to keep boys out of the depot, and to remove them therefrom. It was in the execution of this order that the kicking was done by the servant.

The principal questions in the case were whether the corporation was liable for this act of the servant, claimed to be malicious and in excess of authority; and, if liable, whether the corporation could be joined in the action with the servant.

The court held that the company was liable in trespass, and might be sued in a joint action with the servant. This was based upon the ground that the company was a direct participant, because it had ordered the expulsion of the boy, and thereby became a party to the *manner of* his expulsion. The court, however, expressly approved

the case of *Parsons* v. *Winchell* (see top of p. 425); thereby holding, in effect, that if the circumstances had been such as to have made the company liable only *in case*, it could not have been joined in the action with the servant who committed the wrong. In stating the ground of its judgment the court said:

"To sustain the ruling in the present case, as well as that of *Moore* v. *Fitchburg Railroad*, it is only necessary to hold that where the corporation give an order to a servant to do an act which implies the use of force and personal violence to others, if the servant in the execution of that service goes beyond the proper limits as to the use of force, and commits a trespass by unjustifiable violence, and inflicts an injury by a blow or kick upon the person attempted to be removed, the corporation will be liable in an action of trespass therefor."

It will thus be seen that the court, in its holding that the action might be joint, confined itself to the particular class of cases mentioned. In discussing the objection that the action should have been an action on the case and not in trespass, the court said (p. 424):

"But the objection taken lies deeper than that of the form of action merely, and questions the right to maintain a joint action of trespass against the corporation and their servant, in such a case as the present. If the corporation is chargeable in trespass for the act here complained of, then the joinder is proper, for in trespass all the actors are principals, and he who commands the act, as well as he who commits the trespass, may be joined."

The court there placed the company in the category of one who had commanded the doing of the act which constituted trespass, and on that account alone held that

the action was properly a joint action. If the circumstances had made the company liable only *in case,* and not in trespass, the court would not have held that that was a joint cause of action.

In *Bailey* v. *Bussing,* 37 Conn., 349, the court said (p. 351):

"As we understand the law, in this state, and the practice generally, we do not well see how a joint action can be maintained against a master and his servant for the negligence of the servant alone."

This was held in a case where the suit was against a master and servant for damages sustained by a passenger in a stage-coach, belonging to the master, caused by the carelessness of the servant who was driving the vehicle.

See also *Sellick* v. *Hall,* 47 Conn., 260, where the court said (p. 274):

"It is not enough to make torts joint that the acts constituting them stand even in immediate juxtaposition, both in time and place. There must be a oneness of act. Two men with their carts may enter upon my land and each dig and carry away my soil. Yet if they are not acting in concert there are two distinct torts and not a joint one, even though they dig from the same pit and at the same time. Here there is not even a juxtaposition of the wrongful acts, the one being the maintenance of an insufficient channel by the defendant, the other the letting in of an increased volume of water and sewage from artificial drains and sewers. The fact that the effects of their several wrongful acts are produced at the same time and place can not affect the question."

Page v. *Parker,* 40 N. H., 47, was an action in damages for false representations in the sale of a soap-stone quarry. The action was against three persons. One of them was the owner of the property sold, and the others were the owner's agent who made the sale and a person who assisted him in making it. The owner gave no authority whatever to make any representations, and made none himself. His only connection with the transaction was through the agent. It was held that a joint action would not lie. The court said (p. 67):

"The ruling of the court below having apparently gone upon the assumption that David M. Parker might be holden liable as a joint conspirator with his brother and Reding, solely by reason of their alleged false and fraudulent conduct and representations, although he had neither conspired or combined with them to defraud the plaintiff, nor had in any way participated in or had any knowledge of, or given any authority for their alleged false and fraudulent conduct, representations and purpose, was therefore erroneous. The master and his servant, or the principal and his agent, can not be holden jointly liable in an action of tort for the unauthorized fraudulent acts or representations of the servant or agent, committed or made without the knowledge and concurrence of the master or principal. *Parsons* v. *Winchell,* 5 Cush., 592; *Wright* v. *Wilcox,* 19 Wend., 343; 1 Pick., 62.

"In an action *ex delicto,* the act complained of must be the joint act of all the defendants, either in fact, or in legal intendment and effect. But the act of a servant or agent is not the act of the master, or principal, even in legal intendment or effect, unless the master or principal previously directs or subsequently adopts and ratifies it. *Parsons* v. *Winchell,* 5 Cush., 593."

In *Clark* v. *Fry*, 8 Ohio St., 377, the Supreme Court of Ohio, in holding that a joint action could not be maintained against a lot owner and his servant for an excavation in front of house of the lot owner, negligently left unfenced and unguarded by the servant, whereby plaintiff sustained an injury, said:

"If, however, Freeman, acting under the control and direction of Clark, as his servant or agent, had negligently and wrongfully allowed the excavation to be in an unfenced or otherwise dangerous condition, whereby the injury was sustained, Clark would be liable, although not jointly, with Freeman. In this last instance supposed, either Clark or Freeman might be sued separately; but inasmuch as Clark, although he could not excuse himself on the ground that the nuisance had been occasioned by the negligence of Freeman, would have a right of action against Freeman for the recovery of such damages as he might be compelled to pay by reason of his negligence, he (Clark) could not be joined in the same action with Freeman. This doctrine was expressly ruled in *Parsons* v. *Winchell*, 5 Cush.. 592; and it appears to rest upon a reason which is entirely satisfactory."

In *Bennett* v. *Fifield*, 13 R. I., 139, it was held that where an obstruction, calculated to frighten horses, is left in a highway, and remain there after the town has become chargeable with notice of its presence and character, the town is liable, and the person who placed it there is also liable, but they are not liable jointly. The reason why the action is not joint is thus stated by the court (pp. 140-1):

"We are, however, very clearly of the opinion that Lovell and the town can not in any sense be regarded as joint tortfeasors. The torts which are imputed to them

respectively are distinct. The tort with which Lovell is charged, and for which he was sued, is a tort at common law. The tort with which the town is charged is the neglect of a statutory duty. It would be impossible to declare against them jointly if they were jointly sued, for there was no community of wrong-doing between them. It is true there is a relation between the torts, inasmuch as without the tort committed by Lovell, the statutory duty, which the town is accused of neglecting, would not have devolved upon it."

In *Cole* v. *Lippitt*, 22 R. I., 31, the action was trespass on the case for negligence. It was brought against an owner of a building and the architect supervising its construction, for causing the death of plaintiff's decedent by reason of the falling of a part of a tower of a house that was being constructed. The negligence charged against the owner was that of causing the erection of the house upon improper plans, which provided for a tower with an overhanging battlement without proper support, and also provided for bricks and mortar of a kind too hard to form a strong bond. The negligence charged against the architect was that of causing the erection of a house under improper plans; and the negligence against the builder was in not using proper construction and in failing to properly counter-balance and anchor the walls, and not allowing time for the mortar to set and harden. The court said (pp. 32, 33):

"These several charges of negligence are quite different in kind and relation, but the plaintiff claims that they constitute a joint liability, because the negligence of each defendant combined with others to produce the injury. This, however, is not enough to make a joint tort. As

the wall, yet if "in execution of the order it was the necessary or natural consequence of the act ordered to be done that the rubbish should go against the wall, the master is answerable in trespass. The evidence shows that that was the natural consequence."

And Littledale, J., said:

"If the servant, therefore, in carrying into execution the orders of his master uses ordinary care and an injury is done to another, the master is liable in trespass. If the injury arise from the want of ordinary care in the servant the master will only be liable in case."

And Parke, J., said:

"Stubbings says he was desiring not to let the rubbish touch the wall. But it appeared to be of a loose kind, and it was therefore probable that some of it naturally might run against the wall. Stubbings said that some of it of course would go against the wall. Now the defendant must be taken to have contemplated the probable consequence of the act which he had ordered to be done, and one of these probable consequences was, that the rubbish would touch the plaintiff's wall. If that was so, then the laying the rubbish against the wall was as much the defendant's act as if it had been done by his express command. The defendant, therefore, was the person who caused the act to be done, and for the necessary or natural consequence of his own act he is responsible as a trespasser."

This is another case where the act resulted, in contemplation of law, from the direct command of the employer. It is interesting to note the distinction in that respect between it and the case of *Sharrod* v. *London & Northwestern R. R. Co.*, 4 Ex. Rep., *p. 580 (*supra*). *Gregory* v. *Piper* supports our contention, because it recognizes

that the liability of the master for mere negligence of the servant rests on an entirely different principle from that upon which he is held liable where he directly participates in the wrongful act.

Moreton v. *Hardern,* 6 Dow. & R., 275, was an action on the case against three persons for injury to the plaintiff by negligent driving, whereby the plaintiff's cart was damaged. It was held that the action would lie against all three of the defendants. But it appears that the defendant who was driving and whose negligence caused the injury, and the other two defendants, were proprietors of the coach and horses, so that there was no question of master and servant involved in the case. They were all principals.

Steel v. *Lester and Lilee,* 3 C. P. Div., 121, was an action for damages for injuring plaintiff's wharf by a sloop breaking loose from her moorings under circumstances showing negligence on the part of the defendant Lilee in the management of the vessel. An action was brought in the county court against Lilee, the master of the vessel, and against Lester, the owner, and a judgment recovered. On appeal to the common pleas division the only question was whether under the circumstances of the case the owner, who alone took the appeal, was liable for the act of the master of the vessel. The master of the vessel was operating it in trade under an arrangement whereby he was to pay all expenses and divide the net profits with the owner. It was claimed on behalf of the owner that the arrangement amounted to

a hiring of the vessel to the master with absolute control, and for whose acts, therefore, the owner was not liable. The appeal was heard before only two of the judges. Lindley, J., thought that the true relation between the master and the owner was that of partners, and that on that ground the owner was liable.

But supposing that the relation between the two had been that of master and servant; no point was raised in the case as to the right to join the two in the same action, *and therefore the question we are considering was not discussed or passed upon.*

In *Wright* v. *Wilcox,* 19 Wend., *343, Cowen, J., made a statement, not necessary to the decision of the case, but which nevertheless has been the source of much subsequent error. The suit was an action on the case for injury sustained by a boy in being run over by a wagon driven by one of the defendants who was the son of the other defendant. The boy asked the driver of the wagon for permission to ride, which was given; but, while the boy was attempting to get upon the wagon the driver suddenly whipped up the horses into a trot throwing down the boy, so that the wheels passed over him. The verdict and judgment were entered against both defendants, father and son; but the court set aside the judgment against the father on the ground that he was not liable at all for the act of his son, because it was willful and malicious, and hence unauthorized.

Inasmuch as the father, who was claimed to be a principal, was held to be not liable at all, it became of

no consequence whether he was properly joined in the action with the son who caused the injury or not. Therefore we think that the following statement by Cowen, J., is obiter, viz.:

"In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence at the same time, and under the same circumstances; the servant in fact, and the master constructively, by the servant, his agent."

Another defect in the statement, apart from its being obiter, we submit, is that the master is not guilty of negligence at all in the case supposed. The only negligent person is the servant. The master is not negligent; but only responsible by fate of law because another is negligent. See *Helms* v. *Northern Pacific Railway Co.,* 120 Fed. Rep., at p. 392, for a criticism of this statement of Cowen, J., and for a review of the most of the other cases alleged to be contrary to our contention. *Wright* v. *Wilcox* is also repudiated in *Parsons* v. *Winchell,* 5 Cushing, at p. 594, and in *Warax* v. *C., N. O. & T. P. Ry. Co.,* 72 Fed. Rep., at p. 646.

Suydam v. *Moore et al,* 8 Barb., 358, was an action against the engineer and fireman of a locomotive for running over plaintiff's cow on the track at a place where it was not fenced. The case turned upon the statute of New York, which made the company and its employes liable for killing stock where the company had not built fences and cattle-guards. The company was not party to the case, and therefore whatever was said by the court in

regard to liability of the master was unnecessary, as no question of that sort was involved.

Montfort v. *Hughes et al,* 3 E. D. Smith, 591 (New York Court of Common Pleas), was an action for damages against the servants and their employers, caused by the servants driving horses, belonging to the employers, over the plaintiff. The case was begun in the Marine Court. Defendants did not appear on the first day of the trial, and one witness was then examined and the case continued to the next day; on that day defendants appeared and pleaded to the merits; and on motion, Wild, the servant, was struck from the record as a party, and was used as a witness, on the theory that the servant and master were improperly joined. On appeal to the Common Pleas Court, it was held that the motion to strike Wild from the record was too late (p. 593), and was therefore erroneous.

This was enough to dispose of the case; but nevertheless the court went on to say that there was no misjoinder, referring to and following the statement of Cowen, J., in *Wright* v. *Wilcox.*

Phelps v. *Wait,* 30 N. Y., 78, was an action against master and servant for injury caused by the servant in driving the master's wagon. Justice Hogeboom, citing Cowen, J., in *Wright* v. *Wilcox,* said:

"I have been unable, after a somewhat diligent examination, to find any reported case holding a contrary doctrine." (See p. 79.)

The judge made no allusion to the decisions in England, Massachusetts, New Hampshire and Ohio, which we have cited. All of them were decided prior to that time (1864); and his statement that he could find no case to the contrary is indeed surprising.

Newman v. *Fowler*, 37 N. J. Law, 89, was an action of damages against an architect for want of care in supervising the erection of a building. There was no question as to liability of master and servant involved in the case.

Wright v. *Compton*, 53 Ind., 337, was an action of damages against the owner of a stone quarry and his employes, for injuries done to the plaintiff by stones cast upon him by blasting in a quarry while he was passing in the highway. The court held it was not a question of negligence in blasting, but that the liability rested upon the fact that blasting could not be done in that quarry without endangering travelers on the highway. (See p. 341.) The case, therefore, came within the principle laid down in *Michael* v. *Alestree*, 2 Lev., 172, and *Gregory* v. *Piper*, 9 Barn. & C., 591 (*supra*).

Hoye v. *Raymond*, 25 Kan., 665, was an action by the owner of property against a constable, his deputy, and the sureties on the constable's official bond to recover damages for a sale of property of one man under an execution against another. The only question involved was whether the cause of action against the deputy constable for his tort could be united with a cause of action against the constable and the sureties on his bond. It was held this could not be done. The court said:

"To render two causes of action identical, they must be founded upon the same breach of the *same* obligation." (p. 667.)

This case is favorable to our contention.

Wilkins v. *Ferrell,* 10 Tex. Civ. App. Rep., 231, was an action against a dentist for damages for fracturing plaintiff's jaw in extracting a tooth. The tooth was drawn by an assistant or employe. There was no question of joint action against master and servant in the case, but exception was taken to the petition on the ground of *non-joinder,* because the assistant who did the work was not made defendant. In that connection the court said that both might have been joined, but it was not necessary to unite both. (See p. 235.)

The statement that both might have been joined is correct when applied to the facts of that case, because the person who pulled the tooth was an employe of the defendant and acted under his supervision and direction. (See p. 236.)

Schaefer v. *Osterbrink,* 67 Wis., 495, was an action for damages against a father and son for careless driving on the part of the son, in which both were held liable, although the father was not present at the time of the occurrence. But there was no question made in the case as to the cause of action being joint, and the court did not pass upon that point.

The foregoing review of cases includes not only those found in the reference given by Mr. Chief Justice Fuller in *Chesa. & Ohio Ry. Co.* v. *Dixon,* 179 U. S., at p. 137,

but others. And we can safely say that in only one of them—*Phelps* v. *Wait*, 30 N. Y., 78—has it been *decided* that for an injury done by a servant, without the presence, direction or concurrence of the master, a joint cause of action accrues against both. And in the case, in which it was so decided, the court was actually ignorant of the leading authorities on the subject.

And on no rational ground can it be said there is a joint tort where the injurious act consists of the negligence of the servant in the performance of something, which would have been harmless if done properly, and there has been no connection of the principal with the act, except that of master's responsibility created by law.

We ask that Question No. 1 be answered in the negative, and Question No. 2 in the affirmative.

Respectfully submitted,

EDWARD COLSTON,

Attorney for the Alabama Great Southern Railroad Co.

JUDSON HARMON,

A. W. GOLDSMITH,

GEORGE HOADLY,

Of Counsel.

May, 1905.

however, that the defendant was the driver of the coach and not the proprietor, and thereupon the plaintiff was non-suited because the action should have been not against the driver but against the proprietor. Lord Ellenborough said (at p. 84):

"I am of opinion that the defendant was not liable in the capacity of a carrier, *and no conversion has been proved to make him liable.* I accede to the proposition, that if the defendant could be considered as having taken the watch to be carried on his own account, for a reward to be paid to him, he would be liable, although he acted in fraud of his master. If it could be shown that he had been in the habit of conveying parcels for hire, the case would certainly be altered; but being a mere servant, it can not be inferred that he took the parcel to be carried for hire and reward without further proof. The only fact is, that he was the driver of the coach; no contract has been proved; there is nothing to indicate that the defendant received the parcel otherwise than in the character of a servant."

And in 1 Blackstone's Comm., *431, the law is thus stated:

"If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect; if a smith's servant lames a horse while he is shoeing him, an action lies against the master and not against the servant."

In Wharton's Comm. on Agency and Agents, Sec. 535, it is said:

"By Anglo-American law, a servant who by negligence in the discharge of his duties injures a third person is not personally liable to such third person. The maxim *respondeat superior* prevails; the principal is liable for the injury, and the agent is then liable to the principal

for damages which the latter may have sustained; and this liability attaches even where the servant, as to the particular act complained of, modifies the principal's secret orders."

In 1 Shearman & Redfield on Negligence (5th Ed.), Sec. 243, it is said:

"No agent of a private individual or corporation is ever liable to third persons for his failure to perform an obligation of his principal and which the principal has employed him to perform, but which he has not contracted with them to perform in their favor. In other words, he is not liable to them for his mere nonfeasance. He is, consequently, not responsible to them for any negligence in the performance of duties devolving upon him purely from his agency, since he can not, *as agent*, be subject to any obligations towards third persons other than those of his principal, and these duties are not imposed upon him by law, nor has he agreed with any one, except his principal, that he will perform them. In failing to do so he wrongs no one except his prinicpal, who alone, therefore, can hold him responsible for his negligence. For the failure of the agent to perform any duty which the principal owes to a third person, the remedy of such person is only against the principal, even though the fault, as a matter of fact, is entirely with the agent."

In 20 Am. & Eng. Encyl. (2d Ed.), p. 52, the law on the subject is stated as follows:

"The servant is not, in general, liable to third persons for his own nonfeasance in the course of his employment. If he neglects to perform a duty which the master owes to third persons, the remedy is against the master and not against the servant. The servant's liability under these circumstances is solely to his master, there being no privity between him and such third persons."

See, also, Story on Agency (9th Ed.), Sec. 308, at p. 378.

In *Denny* v. *Manhattan Co.*, 2 Denio, 115, it was decided that for neglect of the agent the remedy is against the principal only.

The language of the court is:

"If third persons are injured by the neglect of a known agent, the rule is *respondeat superior*, and generally the action must be brought against the principal" (p. 118).

In *Colvin* v. *Holbrook*, 2 N. Y., at p. 129, the Court of Appeals stated the law as follows:

"The rule, it is believed, is universal, that a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred upon him. The very notion of agency proceeds upon the supposition that what a man may lawfully do by a substitute, when performed, is done by himself; and the individuality of the agent so far is merged in that of the principal. It is also settled, *if anything can be established by authority*, that an agent is not liable to third persons for an omission or neglect of duty in the matter of his agency; but that the principal alone is responsible."

In *Murray* v. *Usher*, 117 N. Y., at p. 546-7, the Court of Appeals, by Andrews, J., said:

"The general rule of *respondeat superior* charges the master with liability for the servant's negligence in the master's business, causing injury to third persons. They may, in general, treat the acts of the servant as the acts of the master. But the agent or servant is himself liable as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of

another, or where he directs the tortious act. In such cases the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and nonfeasance. For the former the servant is, in general, liable; for the latter, not."

See also, *Van Antwerp* v. *Linton,* 35 N. Y. Supp., 318.

The question has been thoroughly discussed and the same conclusion arrived at, in:

Feltus v. *Swan,* 62 Miss., 415.
Steinhauser v. *Spraul,* 127 Mo., 541.
Delaney v. *Rochereau & Co.,* 34 La. Ann., pp. 1128, 1129.
Henshaw v. *Noble,* 7 Ohio St., 226, at p. 231.
Kelly v. *Chicago, &c., Ry. Co.,* 122 Fed. Rep., at 289, 290.
Davenport v. *Southern Railway,* 124 Fed. Rep., at 984.

One of the tests by which to determine whether parties may be sued on a joint tort is whether the same proof would make a case against each. That test fails where the master's liability depends only upon his relation of master; because, to hold the servant liable, it would be necessary only to prove the doing of the act; but in order to make the master liable it is necessary to prove, in addition, the agency of the servant and that the injurious act was within its scope.

Of course, where there is no liability on the part of the servant, as we think, is the case here, his joinder in an action with the master could not prevent a removal. There are several anomalies that arise from an attempt to hold the servant liable jointly with the master where

the injury is done by mere negligence of the servant. For example, the carrier of passengers is liable for the highest degree of care that human foresight can provide. But the engineer operating the engine drawing the train would be required to exercise only ordinary care. Suppose an action by a passenger for injury sustained by the derailment of the train: The master is liable for the *least* failure to exercise care; while the engineer would be liable only for failure to exercise ordinary care. So we would have different standards of liability in the same case. Again, a servant would be liable in exemplary damages for a willful assault committed upon a third person in the performance of his employment, while the master, if a corporation, would be liable only for compensatory damages.

Cases Explained.

Under this head we shall consider the cases that those who oppose the contention that we make under the first subdivision of our argument, generally cite. These cases when properly estimated, furnish no answer to our claim.

Michael v. *Alestree*, 2 Lev., 172, was an action on the case against the master and servant for injuries sustained by the plaintiff, for that they brought a coach and two ungovernable horses into Lincoln's-Inn-Fields, "a place where people are always going to and fro about their business," and there drove the horses to make them tractable and fit them for a coach; "and the horses, because of their ferocity and being not to be managed," ran over the plaint-

iff. The court said: "It shall be intended the master sent the servant to train the horses there." The ground of liability was not negligence in driving, but the unfitness of the place for the purpose of breaking horses that were intractable. As it was done by the master's command he was a direct contributor to the thing which caused the injury.

Gregory v. *Piper*, 9 Barn. & C., 591, was trespass against the defendant alone for depositing quantities of bricks and rubbish against the wall, gates and posts of the plaintiff. The defendant had employed one Stubbings, a laborer, to lay down this material near the plaintiff's stable yard, in order to obstruct a passway, the right to use which was in dispute between plaintiff and defendant. The defendant gave Stubbings directions not to let any of the rubbish touch the plaintiff's wall. Accordingly the rubbish was laid at a distance of a yard and a half from the wall, but "being of a loose kind, as it became dry naturally shingled down towards and ran against the wall;" and Stubbings, who was a witness for plaintiff, testified "that some of it would, of course, run against the wall." It further appeared that when an application was made by the plaintiff to defendant to remove the rubbish, the latter said he was determined not to move it. The question in the case was whether an action of trespass would, under these circumstances, lie against the master for the act of the servant, or whether the action should be *on the case*. Bayley, J., said that, although the master desired the servant to lay the rubbish so as not to touch

this court, "in passing upon the right to join the master and servant in the same action," is not hampered by "any technical question of pleading, or the technical distinction under the common law between actions on the case and those of trespass." Even if forms of action had been abolished in Tennessee it would be of no consequence in the present discussion.

In actions of tort the question whether two or more defendants can be joined in the same action depends, and always has depended, upon the nature of the transaction and their connection with the same; and no technical question of pleading or technical distinction between forms of action has entered into the subject.

In Pomeroy on Code Remedies (4th Ed.), Sec. 208, it is said:

"The common law doctrines concerning the liability of tort feasors, and as to joinder or separation of them in actions brought to recover damages for the wrong, are entirely unchanged by the new system of procedure."

But in fact forms of action have not been abolished in Tennessee. To support the statement that they have been abolished opposing counsel quote at p. 3 of their brief Sections 4437, 4438 and 4605 of Shannon's Code of Tennessee, 1896. Of these, Section 4438 is relied upon as abolishing forms of action. It reads as follows:

"All wrongs and injuries to the property and person, in which money only is demanded as damages, may be redressed by an action on the facts of the case. Penal actions may be brought in the same form."

It was originally Section 2747 of the Tennessee Code (Meigs & Cooper, '57-8), and was transferred into the Shannon Code of 1896 with above number (4438). Soon after its enactment the Supreme Court of Tennessee decided, and has since adhered to it, that the only purpose and effect of the section was to eliminate the unnecessary verbiage and profusion of expression characteristic of common law pleading.

In *Cherry* v. *Hardin*, 4 Heisk., at p. 202, the court speaking of this section, said:

"It is insisted that Section 2747 of the Code, which provides that [here the learned judge stated in substance the section] —authorized this form of action here. We do not think so. We construe that statute to mean that the profusion of expression with little substance might be omitted; that matter, without multiplicity of words, is all that is to be required in notifying an adversary of what he is to answer or defend. Certainly it could not have been intended that a naked recital of facts, without more, should be sufficient to entitle the plaintiff to introduce proof, and proceed to verdict and judgment. If so, any informal and incoherent history, without address to any court, averment of debt, or damages, or of complaint, and without conclusions, is sufficient. Already there is too great inclination to construe the Code into an abolition of pleading, and in consequence an abominally loose system is growing up, which, unless checked, will convert the law from a science into a lottery."

In that case the contention was whether the cause of action imputed a *tort*; consequently whether the maxim, *Actio personalis moritur cum persona*, applied. It was claimed that that maxim attached only to actions of *tort*, and that this statute of Tennessee having abolished actions of tort, the maxim was no longer applicable. But the court took a different view; used the language above quoted, and held that the case being in tort the action had abated.

This rule has been followed in later cases in that state, notably *Cotton Oil Co.* v. *Shamblin*, 101 Tenn., 270.

And the Supreme Court of Tennessee, in *Swain* v. *Tennessee Copper Co.*, 111 Tenn., 430, a case decided in 1903, passed upon the question as to when it is proper, in an action of tort, to unite two or more as defendants in the action. That case was an action for damages against two copper companies, operating separate plants used in reducing and converting copper ore into commercial copper, for creating a nuisance by emission of fumes and vapors from their respective premises. These vapors from the two separate plants commingled in the atmosphere and

then drifted upon the premises of the plaintiff, destroying his gardens, orchard and crops. The sole question in the case was whether the two defendants were properly united in the some action under the circumstances. The court decided that this union and blending of consequences was not sufficient to constitute a joint tort; and sustained a demurrer to the declaration on the ground of misjoinder of parties defendant. In determining the question of right to unite those two defendants the court used the common law test of unity, and made no reference whatever to the provisions of Section 2747 of old Code, now Section 4438 of the Shannon Code. On the contrary the court said:

"The questions which this court is called upon to determine in these cases are not merely of *pleading*, but also of liability, or when one tort feasor is liable for damages done by others to the same party." (see p. 436).

Counsel next say that "under the practice and laws of Tennessee, the Supreme Court of such state *recognizes* the right to jointly sue the master and servants"; and then they argue that this court should be governed by such alleged "practice and laws of Tennessee." In answer to this we say:

That there is no statute law of Tennessee and there is no practice in Tennessee that "*recognizes*" the right to unite the master and servant as joint defendants in an action to recover damages from them for an injury caused solely by the negligent act of the servant without any sort of concurring negligence on the part of the master.

It is to be noticed that opposing counsel cite no statute of Tennessee allowing such joinder. And the only basis they furnish for their assertion that there is such practice in Tennessee is a passage in the opinion in the case just mentioned of *Swain* v. *Tennessee Copper Co.*, 111 Tenn., 430, and a passage in the opinion in the similar case of *Jones* v. *Ducktown Sulphur, etc.,*

Co., 109 Tenn., 375. The passage referred to in the case of *Swain* v. *Tennessee Copper Co.* is as follows:

"Torts may also be joint on account of the relations of the parties, such as the joint liability of a husband and wife for the wife's torts, that of the master and servant for the latter's torts, and that of the principal and agent, employer and employe, partner and co-partner, for the acts of the agent, employe, and co-partner, when committed within the scope of the agency, employment, or partnership." (p. 438, 2d par.)

And for this the court cites three Tennessee cases. An examination of them, however, shows that none of them was an action against master and servant, and therefore did not involve the question now under consideration. Nor did the case itself, from the opinion in which the foregoing passage is cited, involve any question as to the right to join master and servant in the same action, and therefore the passage quoted is merely *obiter*. A similar passage from the opinion in *Jones* v. *Ducktown, etc. Co.*, 109 Tenn., 375, relied on by our adversaries, is equally *obiter* and authorized.

We do not claim that there are no circumstances under which master and servant can be united in an action for damages for the negligence of the servant. Our claim is, they can not be united in the same action where the negligence is that of the servant only, in which the master has not participated in any manner whatever otherwise than as his responsibility for the act of the servant may be said to constitute participation, which, however, it can not do.

But we deny that this court, in answering the question asked by the Court of Appeals as to the right to join in the same action the master and servant under the circumstances named, will treat the proposition otherwise than as one of a general nature; there being no statute in Tennessee on the subject. The question is not, whether *in Tennessee* such joinder would be proper, but whether such joinder would be proper

generally, which is determined on the principles of the common law.

It may be that this court, *in construing words of a pleading*, would adopt a construction established by decisions of the highest court in the state. Such seems to be the tendency of *C. & O. Ry. Co.* v. *Dixon*, 179 U. S., 131, and *Connell* v. *Utica, etc. R. R. Co.*, 13 Fed. Rep., 241. But in this case there is no construction of a pleading involved. The pleading has been construed by the Court of Appeals in framing the question. And that court has, for that purpose, construed the declaration in this case as negativing concurrent negligence on the part of the railroad company.

Our adversaries further claim that under the declaration in this case it would be competent to claim that the acts of those operating the train constituted a violation of a statute of Tennessee (Shannon's Code, Sec. 1574, sub-section 4) requiring every railroad company to keep the engineer, fireman, or some other person upon the locomotive always upon the lookout ahead, and when any person, animal or other obstruction appears upon the road the alarm whistle shall be sounded and brakes put down and every possible means used to stop the train and prevent an accident, and that for such violation the company became liable under Sections 1575 and 1576 of said Code, which provides that every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to person or property occasioned by or resulting from any accident or collision that may occur. Counsel then argue that the railroad company thus came under a statutory liability; and they seek to establish the conclusion that such liability constituted negligence on the part of the company, concurrent with the negligence of the servants who, by personal commission, violated the statute. But the answer to this claim of counsel is: (1) The Supreme Court of Tennessee, in *E. T. V. & G. R. R. Co.* v. *Pratt*, 85 Tenn., 14, holds that

this statute is merely declaratory of the common law; and denies that it gives rise to a distinction such as that of a statutory liability and a common law liability. The court there holds that the statute merely specifies the particular acts necessary to be observed in order to fulfill the common law requirement to observe ordinary care. (2) The question itself expressly states that there was no concurrent negligence. This precludes consideration of the question that our adversaries seek to raise on this statute.

But our adversaries, relying on the opinion of Baker, J., in *Charman* v. *Lake Erie & W. Ry. Co.*, 105 Fed. Rep., 449, again bring forward at pp. 13 and 14 of their brief this argument about statutory liability of the corporation. But, as we have said, it is entirely inapplicable, and is aside from the question in this case. But if it were not, the views expressed by Judge Baker are successfully attacked in the opinion of Amidon, J., in *Helm* v. *N. P. Ry. Co.*, 120 Fed. Rep., at pp. 395-6, who says of it:

"The reasoning in *Charman* v. *Railroad Co.*, 105 Fed., 449, is not satisfactory. The court begins with the statement that because the master is liable he must be negligent, thus excluding the possibility that he might be liable because of the negligence of his servant. To satisfy this assumed negligence, a 'duty' is built up which no court ever considered in fixing a master's liability, and which does not fit into the facts of the case or the language of the statute."

II.

Under this subdivision of their brief our adversaries concede there is a conflict in the authorities "as to right of joinder under the facts certified in this case," but express the belief that both "in numbers and in reasoning" they "largely predominate in favor of the right of joinder." We have covered this in our original brief. We have there discussed the authorities that sustain our contention. The cases we rely on were decided by eminent judges, who displayed both research and ability in the

opinions they delivered on the question now under discussion. And we showed that the cases holding the contrary are chiefly traceable to a mere *obiter dictum* by Cowen, J., in *Wright* v. *Wilcox*, 19 Wend., *p. 343. That *dictum* has been followed without examination of the authorities; so much so that the judge writing the opinion in *Phelps* v. *Wait*, 30 N. Y., 78, a case often cited by those who oppose our contention, supposes there is no authority to the contrary of that *dictum*, although at the very time cases in England, Massachusetts, New Hampshire, Ohio, and other states, that we have cited, had been reported.

Our adversaries also say that "most if not all of the Federal cases which hold a contrary doctrine," that is to say, a doctrine contrary to their contention "seem to be bottomed on the decision of Taft, J., in *Warax* v. *C., N. O. & T. P. Ry. Co.*, 72 Fed., 637, and that "they have assumed without discussion or *apparent* consideration that the Warax case stated the correct theory upon which the master's liability is based."

This shows that counsel have, themselves, given but little attention to those cases. That admiration for the distinguished ability of that great public servant who wrote the opinion in *Warax* v. *C., N. O. & T. P. Ry. Co.* did not preclude other eminent United States judges, who wrote opinions in cases we cite, from making most thorough examination of the subject, is obvious from the opinions themselves.

The Federal cases, both before and since the decision in *Warax* v. *C., N. O. & T. P. Ry. Co.*, which contain most thorough discussion of the subject are cited at p. 23 of our original brief; and among the most prominent of them are *Helms* v. *N. P. Ry. Co.*, 120 Fed. Rep. 389; *Shaffer* v. *Union Brick Co.*, 128 Fed. Rep., p. 99 *et seq.*, and *Beuttel* v. *Chicago, etc., R. R. Co.*, 26 Fed., 50.

Since our original brief in this case was written, the opinion of a majority of the Court of Appeals for the Fourth Circuit, reversing the decision of Simonton, J., in *Davenport* v. *Southern*

Railway Co., 124 Fed. Rep., 983, has been published (135 Fed. Rep., 960.) The reversing opinion begins with the statement that—

"It has been for many years a gravely disputed question whether a complaint setting out a misfeasance committed by a servant in the course of his employment, not in the presence of, and not by the express command of the master, resulting in an injury to a third person, states a case of joint tort. The *overwhelming weight* of authority among the subordinate Federal courts is to the effect that it does not (citing cases). Among the state courts there is much authority for either view" (p. 962). (See also, *Sessions* v. *South. Pac.*, 134 Fed. R., at p. 315).

The reversal is then based upon the *assumption* that the opinion of this court in *Southern Railway Co.* v. *Carson*, 194 U. S., 136, made it necessary to follow a decision of the state court of South Carolina where the action originated. But we submit there is nothing of the sort in that case (*Southern Railway* v. *Carson*). There is no question of removal in that case. The only question was whether, if the state court had erred by refusing to charge the jury that it was necessary, in order to recover against the railroad company, to show that all the defendants were liable such refusal was a denial to the railroad company of a right arising under the Constitution or laws of the United States. This question did not call for any determination of this court of the right of removal, nor whether the complaint in the case stated a joint and several cause of action or a several one only; nor did it become necessary for this court to refer to what the decisions of South Carolina or any other states on that subject were, or had been. No petition for removal had been filed, and consequently there was no occasion to determine whether the cause of action was joint and several or several only.

Many of the authorities cited by our adversaries go no further than merely stating that the master and servant may be joined in the same action of tort. Such statements are of no value as